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Supreme Court of the United States

OCTOBER TERM, 1946

No. 404

MEXICAN LIGHT & POWER COMPANY, Ltd.,
PETITIONER

VS.

THE TEXAS MEXICAN RAILWAY COMPANY,
RESPONDENT

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF THE CASE

A general notion of the nature of this case is here set out:

September 20, 1934, Pennsylvania Railway executed and delivered its bill of lading at Sharon, Pennsylvania, for a shipment received from Westinghouse Electric & Manufacturing Company and consigned to "Mexican Light & Power Co., Ltd., (National Railways of Mexico) % Fausto Trevino, Customs Agent, destination, Laredo, Texas," having noted thereon "For export to El Oro, Estado de Mex-

ico, via Acambaro via Laredo," charges prepaid. (Record Exhibit A, Page 32). No through railroad tariffs governing such shipment existed from either Sharon, Pennsylvania, or from Laredo, Texas, to any point in Mexico (I Record Page 37). Respondent was not paid any charges other than those applicable from Sharon to Laredo, which included placing the shipment at the International Boundary Line where it was delivered to the National Railways of Mexico (III Record 38). Respondent did not have and has no agreement to receive any portion of revenue from any traffic moving in Mexico (2nd, Record Page 42); and had no agreement to and did not receive any portion of revenue paid for transportation of this shipment in Mexico (3rd, R. p. 42). As compensation Respondent received $248.70 (and no more) for transporting the shipment from Alice, Texas, to Laredo, Texas, and delivering same at the Boundary Line, which accrued from the export rate from Sharon to Laredo, slightly lower than the domestic rate and applicable because of the bill of lading notation "For Export" (5th, R. p. 43). After delivery to the Mexican Railways at the International Boundary Line and while being transportated in Mexico by the Mexican Lines a derailment thereon October 10, 1934, inflicted $18,500.00 damages to the shipment (6th, 7th R. p. 43). Petitioner filed claim with the Mexican Lines for said damages October 12, 1934, and unsuccessfully pressed same until February 29, 1936, when it was finally declined by the Mexican Lines. The same year Petitioner instituted suit in Pennsylvania against the Pennsylvania Railroad as initial carrier to recover said damages on the theory the Sharon bill of lading was a through bill of lading to El Oro, Mexico, and, therefore, imposed upon the Pennsylvania Company initial carrier liability for the Mexican damages. Suit was thereafter instituted on

the 10th day of October, 1936, against Respondent for the same damage on the theory an instrument issued on its domestic form bill of lading to Fausto Trevino at Laredo, Texas, 9/29/34 showing said shipment was consigned to Mexican Light & Power Company, Ltd., destination El Oro, Mexico, via Acambaro, was a through bill of lading from Laredo to El Oro, imposing upon Respondent initial carrier liability for said damage under the Carmack-Cummins Amendments 49 U. S. C. A. 20 (11) (Ex. P. 8 Rec.) Said Statute imposes initial carrier liability on shipments destined to an adjacent foreign country **only**, when the Domestic Carrier issues a **"through bill of lading."**

Respondent tendered among others the defenses that said instrument was not supported by consideration and would not, therefore, support the cause of action based thereon; that the export rate applied under the Sharon to Laredo bill of lading imposed the obligation upon Respondent to deliver the shipment at the International Boundary Line, which it did, and said instrument issued by Respondent before said delivery was not a through bill of lading within the contemplation of said amendments.

After judgment adverse to petitioner by the Pennsylvania Court this suit was brought to judgment which was adverse to petitioner in the Trial Court and in the Supreme Court of Texas. Other defenses pleaded were not decided by the Supreme Court of Texas.

It is stated (P. 5 of Pet.) with respect to said $248.70 which Respondent received that, "Respondent stipulated that, this payment represented compensation not only for transporting the shipment from Alice, Texas, to Laredo, Texas, but also for delivery of shipment at the International Boundary Line between U. S. and the Republic

of Mexico (R. 43)." This was not a unilateral stipulation by Respondent. Upon the contrary, Petitioner acting through its attorneys is the first signatory to that stipulation. (3d Par. p. 46 R.)

The Supreme Court of Texas summarized the facts "stipulated and those deemed controlling" in its opinion (top p. 106 R.). Those facts (p. 106-107 R.) we do not find challenged. Therefore, Respondent assumes they will be accepted and that it is unnecessary to lengthen this reply by pointing out the record references which show that every such fact is supported by both pleading and evidence or stipulations in the Trial Court.

There is no conflict, as suggested by Petitioner (p. 7, Pet.), between the holding by the Supreme Court of Texas that the instrument here in issue is not a through bill of lading to El Oro, Mexico, and by the United States District Court of Pennsylvania in MEXICAN LIGHT & POWER CO. v. PENNSYLVANIA CO., 33 Fed. Supp. 483, that the Sharon to Laredo bill of lading was not a through bill of lading from Sharon, Pa., to El Oro, Mexico. In one case the issue was whether or not the Sharon bill of lading was a through bill of lading from Sharon, Pa., to El Oro, Mexico; in the other, whether or not the instrument issued by Respondent was a through bill of lading from its yards in Laredo, Texas, to El Oro, Mexico. The fact that each instrument has been held not to sustain a cause of action for initial carrier liability under the Carmack and Cummins Amendments for negligence in Mexico does not constitute conflict. No law requires that one or the other be a through bill of lading or that some method be found by which Petitioner be made whole by a domestic carrier for Mexican negligence.

At the outset, Respondent submits the following

FIRST PROPOSITION

THE RECORD AFFIRMATIVELY SHOWS THAT THE STATE COURT RESTED ITS DECISION IN THIS CASE UPON TWO SEPARATE AND DISTINCT GROUNDS, ONE OF WHICH WAS THAT THE PURPOTED BILL OF LADING ISSUED BY RESPONDENT AT LAREDO, TEXAS, WAS WITHOUT CONSIDERATION, A NON-FEDERAL QUESTION ADEQUATE AND SUFFICIENT WITHIN ITSELF TO SUSTAIN THE DECISION; AND THE OTHER THAT RESPONDENT WAS NOT "AN INITIAL CARRIER" UNDER 49 U. S. C. A., SECTION 20 (11) OF THE TRANSPORTATION ACT, A FEDERAL QUESTION. THEREFORE, UNDER THE SETTLED RULE OF DECISION IN THE SUPREME COURT OF THE UNITED STATES, PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI IS INSUFFICIENT TO INVOKE JURISDICTION TO REVIEW SAID DECISION.

AUTHORITIES

Lynch v. People of New York, 55 Sup. Ct. 16, 17, 293 U. S. 52, 54;

Radio Station WOW v. Johnson, 65 Sup. Ct. 1475, 1480; 326 U. S. 120, 129;

Williams v. Kaiser, 65 Sup. Ct. 363, 367; 323 U. S. 471, 477.

ARGUMENT

A bill of lading is a written contract between a shipper, on the one hand, and a common carrier, on the other. It serves two purposes: A receipt to the shipper, and to evidence the obligation of the carrier to trans-

port the goods in consideration for a stipulated compensation. That a bill of lading, like other contracts, must be based upon a consideration, is axiomatic.

The Supreme Court of Texas admittedly held that the purported bill of lading made the basis for Petitioner's suit was without consideration and, therefore, would not support a cause of action. That question was purely one of state or local law. With respect to consideration, it involved exclusively application of the law of the state to the facts. It was not affected by any Federal Statute.

In addition to resting its decision upon said non-Federal question, which was sufficient and adequate within itself to dispose of the case, the Supreme Court of Texas based its decision upon a further ground, namely, that Respondent was not an "initial carrier" under the purported bill of lading within the meaning of Section 20 (11), 49 U. S. C. A., of the Transportation Act. Thus, the Supreme Court of Texas based its holding upon two independent and distinct grounds, one involving a non-Federal question; the other involving a Federal question. In this situation the Supreme Court of the United States has heretofore often held that it will not assume jurisdiction to review a decision of the State Court. In LYNCH, ET AL v. PEOPLE OF NEW YORK, 55 Sup. Ct. 16; (17), 293 U. S. 52, (54), the Supreme Court said:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that

judgment as rendered could not have been given without deciding it. (Citing numerous Supreme Court authorities.) **Where the judgment of the state court rests on two grounds,** one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. (Citing numerous Supreme Court authorities.)"

The same rule was laid down in RADIO STATION WOW v. JOHNSON, 65 Sup. Ct. 1475 (1480); 326 U. S. 120 (129), in the following language:

"This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law. 'Where the judgment of the State court rests on two grounds, one involving a federal question and the other not * * * and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.'" (Citing Supreme Court authorities.)

And, again, in WILLIAMS v. KAISER, 65 Sup. Ct. 363 (367), 323 U. S. 471 (477), in the following language:

"* * * It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. (Citing Supreme Court authorites.) And where the decision of the state court might have been either on a state ground or on a federal ground and the

state ground is sufficient to sustain the judgment, the Court will not undertake to review it. (Citing Supreme Court authorities.) We adhere to those decisions. But it is likewise well settled that if the independent ground was not a substantial or sufficient one, it will be presumed that the state court based its judgment on the law raising the federal question, and this Court will then take jurisdiction.' (Citing Supreme Court authorities.)

It is, therefore, submitted that the rules announced and applied in the foregoing decisions, when applied to this Record, impel that the Petition for Writ of Certiorari here be dismissed, or denied.

FIRST COUNTER-POINT

(Counter to Point I, Page 11 of Brief)

THE INSTRUMENT ISSUED BY RESPONDENT SEPTEMBER 29, 1934, UPON WHICH PETITIONER'S CAUSE OF ACTION IS GROUNDED, WAS CORRECTLY HELD BY THE SUPREME COURT OF TEXAS TO HAVE NOT BEEN SUPPORTED BY VALUABLE CONSIDERATION.

ARGUMENT AND DISCUSSION OF AUTHORITIES UNDER FIRST COUNTER-POINT

Every written instrument imports, and is presumed in law to be supported by, a consideration. In Texas that import and presumption are not conclusive. Rules of Practice and Procedure in Civil Actions promulgated by the Supreme Court of Texas impose upon any defendant desiring to defend against a written instrument upon the ground it is not supported by a consideration to file a pleading verified by affidavit, that the "written instrument upon which a pleading is founded is without consideration ***". (Rule 93 (j).)

Respondent complied with that requirement. (IV (2-b), R. p. 14; Fourth, R. p. 19; Affidavit, R. p. 23.)

Thereby, consideration or not for the instrument sued upon was put in issue. Import and presumption of consideration thus became subordinate to the facts. The Sharon to Laredo bill of lading carried on its face the notation, "For Export to: El Oro, Estado de Mexico, via Acambaro, via Laredo." That information was not peculiar to the instrument sued upon. Under the Sharon bill of lading the shipment moved from Sharon over the Pennsylvania and its connecting carriers to Alice, Texas, where it was delivered to Respondent and by it transported to its yards in Laredo.

The opinion by the Supreme Court of Texas shows the following facts: Petitioner's agent in the matter did not pay Respondent any charge other than applicable from Sharon, Pa., to Laredo, Texas, and that charge included delivering the shipment to the National Railways of Mexico at the International Boundary Line; Respondent received no portion of revenue paid the National Railways of Mexico for transporting the shipment from the International Boundary Line into Mexico, and had no agreement to receive any portion of such revenue or to recoup or be reimbursed any damages it might pay on account of negligence in Mexico; Respondent received $248.70 of the Sharon to Laredo charges for its compensation for transporting the shipment from Alice, Texas to Laredo, Texas, and for there delivering same to the International Boundary Line; the freight charges were based upon the export rate from Sharon, Pa., to Laredo, Texas, which were slightly lower than the domestic rate and were applicable because of the endorsement of the Sharon bill of lading, "For Export" to El Oro, Mexico; Respondent issued the instrument sued upon the day after shipment arrived at Laredo and, after delivery of said instrument to Pe-

titioner's agent, he completed his arrangements with the Mexican Customs Office for exportation into Mexico and notified Respondent thereof, whereupon it moved the shipment from its yards to the middle of the International Bridge between Laredo, Texas, and Nuevo Laredo, Mexico, where the National Railways of Mexico picked the shipment up, and it thereafter sustained derailment and the damages here sued for in course of transportation in Mexico (R. p. 106-107).

Petitioner concedes (p. 13, Brief), "Respondent was under no obligation to issue a new bill of lading * * *." After the decision of the United States District Court (MEXICAN LIGHT & POWER CO. v. PA. CO., 33 Fed. Supp. 483, which found "the rate was a through rate from Sharon to the border only"), which held against the contention there made by Mexican Light & Power Co. that such bill of lading was a "through bill of lading" from Sharon to El Oro, Mexico, said Power Company prosecuted this suit to judgment on the claim that the instrument Respondent issued at Laredo before the shipment reached the Boundary Line constituted a through bill of lading from Laredo to El Oro, Mexico, by which the Carmack-Cummins Amendments, 49 U. S. C. A. Sec. 20 (11), imposed liability upon Respondent for the Mexican negligence.

If the contention of Petitioner be correct, then for the export rate (lower than that to Laredo) which Petitioner claimed and received the benefit of, and which did not impose upon the domestic carriers liability for Mexican negligence here sought to be recovered, Petitioner procured from Respondent, (which received no payment or promise of any sort other than its proportion of the export rate already paid and which obligated it to de-

liver the shipment to the International Boundary Line), an instrument which imposed upon Respondent, in addition to said obligation to deliver at the International Boundary Line, the obligation to pay Petitioner for all damages which the shipment might sustain after delivery at the Boundary Line and while in course of transportation in the Republic of Mexico. This would necessitate a holding to the effect, without support in pleadings or facts, that after arrival at the yards of Respondent in Laredo the destination of the Sharon bill of lading was changed from the Boundary Line to the yards in Laredo, and that Respondent voluntarily assumed the obligations of a new through bill of lading from said yards to El Oro, Mexico. The lower export rate was applied throughout to the Boundary Line. No other consideration than included in that rate passed for a new through bill of lading. The higher rate for shipment destined to Laredo was not assessed. The obligation was already imposed through the Sharon bill of lading and export rate to deliver at the border, but it imposed no liability for negligence in Mexico. To sustain the cause of action here would be to impose upon Respondent liability for Mexican negligence without Petitioner having ever paid anything for that cause of action. It would be to give Petitioner something for nothing.

It was said by the Pennsylvania Court (33 Fed. Supp. (1) and (2), page 484):

> "The scope and effect of a bill of lading, like any other contract, is governed by the intent of the parties. Evidence of intent is to be sought not only from the form in which the contract has been cast (although that is a matter of major concern), but also from the facts and circumstanecs surrounding its issue."

When the real effect of a holding here contended for by Petitioner is visualized in the light of the facts and circumstances surrounding the issue of the Sharon bill of lading and of the instrument sued upon, support for such holding is not found in the Record.

Petitioner states (p. 12, Brief) that the simultaneous holdings by the Supreme Court of Texas that the instrument sued upon was not supported by consideration and that in delivering the shipment to the International Boundary Line Respondent was acting as a delivering carrier under the Pennsylvania bill of lading (R. p. 107-108), "clearly illustrates the fallacy inherent in the concept that the Respondent received the money as a delivering carrier under the Pennsylvania bill of lading when, at the same moment, Respondent not only admits, but asserts, that it was not a delivering carrier." This conclusion depends upon accepting an allegation contained in an independent count of Respondent's pleading in the Trial Court (which Court has not entered into the decison by the Supreme Court of Texas), to the effect Respondent was merely an "intermediate" and not a "delivering carrier" at Laredo, as overcoming the holdings by both the Pennsylvania Court and the Supreme Court of Texas that the Sharon to Laredo bill of lading and export rate extended to the Boundary Line, and wholly disregards the stipulations as to where the sole compensation received by Respondent came from and for what it was paid. Other independent counts upon which the Supreme Court of Texas based its decision were that no consideration supported the instrument sued upon and that it was not a through bill of lading within the meaning of Title 49, Sec. 20 (11), U. S. C. A.

Petitioner also brings forward a statement in the opinion of the Court of Civil Appeals (R. p. 52; p. 12, Brief)

to the effect that Respondent was paid for transportation to the Boundary Line and could not lawfully receive any additional sum for transporting the property from its yards to the Boundary Line. The fact the Sharon bill of lading and the export rate applied thereto obligated delivery at the Boundary Line (which included transporting the shipment from the yards at Laredo to the Boundary Line) was the maximum charge which could be made under the law to the Boundary Line, ought to be sufficient in itself to show that said charge would not be consideraton for the instrument sued upon as a new bill of lading from Laredo to El Oro, Mexico, and the assumption thereby of liability to Petitioner for negligence in Mexico.

Petitioner stresses that shipments were delivered generally by Respondent to the National Railways of Mexico at the Boundary Line under an arrangement that the Mexican Lines would there receive such shipments, and that Respondent knew when it so delivered this shipment that it was destined for El Oro, (p. 12-13, Brief). The Sharon bill of lading itself disclosed that information upon which to claim the export rate. The tariff which provides an export rate to the Boundary Line for shipments which the bill of lading discloses are for export to Mexican destinations (as the Sharon bill of lading here disclosed), and which imposes upon Respondent for its share of the export rate to deliver the shipment at the International Boundary Line that the Mexican Lines may receive it for further transportation to the ultimate Mexican destination, necessarily presupposes that all such shipments will be so delivered and received. Petitioner accepted the judgment of the District Court in Pennsylvania that these notations on the Sharon bill of lading did not

constitute it a through contract for delivery at the Mexican destination. Said facts provide no more evidence that the instrument here sued upon was a through bill of lading from Laredo to El Oro, Mexico, than they provided in the Pennsylvania case that the bill of lading there was a through bill of lading to El Oro.

Petitioner also says (p. 13, Brief) the holding of no consideration is, "founded upon an erroneous conception of the legal effect of both of the bills of lading upon which this shipment moved," and that the holding that the "Sharon" bill of lading controlled the shipment to the International Boundary Line is in direct conflict with the holding of the Pennsylvania Court that the Sharon bill of lading was "fulfilled and the Defendant (Pennsylvania Railroad) discharged from further obligation to transport the goods when it delivered them to Trevino, the plaintiff's (Petitioner's) agent at Laredo." This claim of conflict, too, depends upon an inaccurate tender as to what the Pennsylvania Court held, and it is destitute of substance. The export rate, "was a through rate from Sharon to the border only" (p. 485, 33 Fed. Supp.) The Boundary Line is the border. It is undisputed that rate and the Sharon bill of lading obligated Respondent to deliver the shipment at the International Boundary Line that the Mexican Lines could there accept it to complete the El Oro destination. The Pennsylvania Court did not in fact hold said bill of lading was ever discharged. Indeed, it made no holding whether or not the shipment was in fact delivered to Trevino. The Court said that, "The contract as written **would be fulfilled and the defendant discharged from further obligation to transport the goods when it delivered them to Trevino, the plaintiff's agent at Laredo.**" (p. 485, 33 Fed. Supp.) (Black type

ours.) That statement is self-evident. Whether or not such delivery could be made elsewhere than at the International Boundary Line was not presented to nor decided by the Pennsylvania Court. The sole issue for its determination was whether or not the Sharon bill of lading was a "through bill of lading" from Sharon, Pa., to El Oro, Mexico. Respondent was not a party to that suit. The Pennsylvania Court did say in the introductory statement of the nature of the case that, "The necessary customs inspection and appraisal were made under the supervision of the plaintiff's (petitioner's) agent, and the machinery was delivered in the original cars to the Texas Mexican Railways, which issued a new bill of lading for it to the plaintiff (petitioner), covering the movement of the shipment from Laredo to El Oro, Mexico." (p. 484, 33 Fed. Supp.). That is not a holding that said instrument was a through bill of lading from Laredo, Texas, to El Oro, Mexico, within the Carmack-Cummins Amendments.

With respect to a "through bill of lading" or not, the issue in this case was whether or not the instrument executed by Respondent was such an instrument from its yards in Laredo, Texas, to El Oro, Mexico. No law obligated Respondent to issue such a bill of lading. No tariff existed and no rate was made to cover transportation from Laredo to beyond the Boundary Line. Different instruments between different points issued by different carriers were before the two courts. It is, therefore, apparent there is no conflict between their holdings.

Petitioner conceives error in the holding, "there was no consideration to support the bill of lading sued upon." (p. 15, Brief), because it says the Supreme Court of Texas failed to "discern the difference between the facts

of the Ward case, supra (M. K. T. Ry. Co. v. WARD, 244 U. S. 383, cited by the Supreme Court of Texas), and the instant case." If we correctly understand the distinction Petitioner makes between this case and the Ward case, it is this: That the second bill of lading in the Ward case covered "a portion of the transportation already entirely covered" by the initial carrier (i. e., from Llano to Elgin). We do not find in the Ward opinioin any statement the bill of ladng issued by the M. K. & T. Rys. at Elgin, (where they received the shipment) was one from Llano to Elgin over the H. & T. C., thence over the M. K. & T. Rys. However, it does appear continuity of the shipment as interstate from Llano, Texas, through Elgin and to Winona, Oklahoma, was accepted and the original rate was protected. The second bill of lading there imposed upon the shipper obligations with respect to notice, as condition precedent to suit, which the first bill of lading did not contain. The M. K. & T. Rys. sought to impose those new obligations upon the shipper. In return for their assumption by the shipper he received nothing from the carriers.

Here, by its "For Export" and other notations, the Sharon bill of lading to Laredo secured for Petitioner the export rate. That rate extended to the International Boundary Line. Therefore, such bill of lading issued was obviously a contract to transport such shipment from Sharon, Pa., to the International Boundary Line. That was one entire contract for one entire compensation. When the shipment reached the yards of Respondent at Laredo, Texas, its ultimate bill of lading destination, to-wit, the International Boundary Line, had not been reached. Therefore, that bill of lading had not then been discharged. In that situation Respondent issued the in-

strument sued upon and after Petitioner's agent perfected his arrangements with Mexican authorities and so notified Respondent, it placed the shipment at the Boundary Line. Upon that placement and not before was the bill of lading contract discharged. The export rate was protected and the higher domestic rate from Sharon to Laredo was not assessed.

If the Sharon bill of lading was discharged in the yards of Respondent before it delivered the shipment at the Boundary Line, it would follow the Pennsylvania Company could not thereafter have been held as original carrier for damages inflicted between the Laredo yards and the Boundary Line. That would have been repugnant to the Act. Therefore, the contention the Sharon bill of lading was discharged in the yards and before delivery at the International Boundary Line would seem frivolous.

If the instrument sued upon be held to be a through bill of lading from the yards in Laredo to El Oro, it then imposed upon Respondent a new and very substantial liability which was not imposed under the Sharon bill of lading, to-wit, full liability under the Act for all Mexican negligence. Petitioner paid and Respondent received nothing for assumption of that new liability. Does it not follow there was no consideration for the new assumption of liability?

Intention does not seem to have been made an issue of fact in the Ward case. Petitioner here made none that the Sharon bill of lading was intended or understood to have been discharged prior to delivery of the shipment at the Boundary Line, nor that the parties intended and understood the instrument sued upon to evidence the

liability now imputed to it by Petitioner. No facts or stipulations in support of either such issue are pointed to by Petitioner to sustain its arguments and statement that the Sharon bill of lading ended while the shipment was in the Laredo yards or that the shipment moved from the Laredo yards to the Boundary Line on said instrument, or that the Mexican Lines issued no bill of lading, or that none was necessary by reason of the issuance of said instrument. As to those, Petitioner must rely solely upon law unaided by facts.

Parallelling the facts in this and in the Ward cases, we have: Here, a through bill of lading issued by the initial carrier, in consideration for the tariff export rate, for an interstate shipment from Sharon, Pa., to Laredo, Texas, shared in by Respondent who was obligated by the bill of lading and that rate to deliver the shipment at the International Boundary; charges based upon the export rate were prepaid to the Boundary; Respondent received the shipment at Alice, Texas, and transported the same over its line under that bill of lading from Alice, Texas, to its yards in Laredo; there, the shipment was held pending arrangements by Petitioner's agent with Mexican authorities to export the shipment into Mexico. The ultimate bill of lading destination had not yet been reached. In this situation Respondent issued the instrument sued upon which Petitioner now contends was a new through bill of lading from the yards in Laredo, Texas, to El Oro, Mexico, by which Respondent became imposed with full liability for Mexican negligence, a liability not imposed by the Sharon bill of lading. No new consideration was paid to or received by Respondent for the assumption of such new liability.

When the Elgin bill of lading issued, the shipment had moved from Llano to Elgin on the original bill of

lading and was thereunder destined beyond Elgin. The freight charges had been paid at Llano. While the Llano bill of lading was thus in effect, the second bill of lading was issued, which conferred upon the carriers new benefits without any corresponding consideration passing from them to the shipper. Upon those facts this Court held: First, the initial carrier bill of lading of an interstate shipment governs the entire transportation; second, pending that transportation, a second bill of lading may not impair the original bill of lading; third, where a carrier is bound to transport at the rate named in the original bill of lading, acceptance by the shipper of a second, imposing upon him new obligations without consideration, is void.

Therefore, the only material difference we find in parallelling the facts are: The second instrument issued by the M. K. & T. Rys. terminated at the same destination the original bill of lading terminated, while here the second instrument issued by Respondent is claimed to have extended,—not only to the destination fixed by the original bill of lading,—but in addition thence to El Oro, Mexico. The second instrument, in the Ward case, if valid, overlapped only the unperformed transportation obligated under the original bill of lading; in the present case, it not only overlapped the unperformed transportation obligated by the original bill of lading, but in addition obligated additional transportation. The second instrument issued in the Ward case, if valid, conferred new benefits upon the carriers at the expense of the shipper, while the second instrument here issued by Respondent, if valid as a through bill of lading, conferred new benefits upon Petitioner at the expense of Respondent.

We, therefore, submit the criticism of the Supreme Court of Texas in its application of the Ward case is not

sustained, and its "failure to discern" is more imaginary than real.

Petitioner next says the holding in GA. SO. & F. RY. CO. v. TIPTON PRODUCE CO., 176 S. E. 89, cited by the Supreme Court of Texas, is no authority for its holding because Respondent handled this shipment from Alice, Texas, to the International Boundary Line on its own line and at its own expense, while in the Tipton case the issuing carrier did not handle the shipment under its bill of lading, but such handling was wholly upon another line. The Supreme Court of Texas holds that the entire handling by Respondent of the shipment to the Boundary Line (the terminus of Respondent's line) was under the Sharon bill of lading, and that if the shipment ever moved on the Laredo bill of lading, it was not until after delivery under the Sharon bill of lading at the center of the International Bridge, and, therefore, wholly over the Mexican Lines. As we have seen, Petitioner asserts, and the Court of Civil Appeals asserted, in arguing the instrument sued upon was a through bill of lading to El Oro, Mexico, that the Mexican Lines issued no bill of lading but moved the shipment upon the instrument sued upon. Therefore, if the Mexican Lines did move the shipment under said instrument as a bill of lading, that, of itself, would be no evidence said instrument imposed initial carrier liability upon Respondent. Where transportation is wholly off the line of the carrier issuing the bill of lading, it is not an initial carrier within the Act, is what we understand the Tipton Produce Co. case to hold.

Petitioner (p. 15-16, Brief) disposes of PANHANDLE & S. F. RY. CO. v. McCRUMMEN, 240 S. W. 607, cited by the Supreme Court, as valueless for that purpose because that case involved an intrastate and not an inter-

state bill of lading. That it did this is true. However, the State Statute imposed initial carrier liability with respect to intrastate shipments and authorized the initial carrier to issue a through bill of lading binding upon it and its connecting carrier as well. Said Statute was patterned after the Federal Statute creating initial carrier liability. In the McCrummen case the Court said:

> "This is the only bill or receipt authorized for the entire shipment, and one issued by a connecting carrier is of no binding force or effect unless upon a new or independent consideration moving to the shipper. Evidently by this addition to the amendment it was intended to adopt the same rule applied in interstate shipments under the Interstate Commerce Act (U. S. Comp. Stat. Sec. 8563 et seq.); Railway Co. v. Ward, 244 U. S. 383, 37 Sup. Ct. 617, 61 Law Ed. 1213; Railway Co. v. Ward (Tex. Civ. App.), 159 S. W. 375 (3-5.)"

Thus, the Supreme Court of Texas cited the McCrummen case to show with respect to a through shipment in Texas that the rule in Texas is the initial bill of lading is binding upon all the connecting carriers along its route and any attempt by any connecting carrier to issue a new bill of lading, without new consideration, before the shipment has been delivered at the destination stipulated in the original bill of lading is void, and that such rule has been established in reliance upon the interpretation by the State Courts of the Ward case as holding to like effect with respect to an interstate bill of lading. We submit the McCrummen case holding and the manner in which it appears the holding was made are in point, unless it be that under the Carmack and Cummins Amendments a new bill of lading imposing new obligations may be lawfully issued by a connecting interstate carrier with respect to an interstate shipment en route under an initial

carrier bill of lading and before its destination has been achieved, and supersedes that bill of lading without necessity for a new consideration. Such holding here would result in Petitioner procuring benefit of the lower export rate from Sharon, Pa., to the International Boundary Line, although after claiming that rate, the destination was changed to the Laredo yards, to which destination a higher rate was fixed by the tariff. Then, in treating the shipment as a new shipment originating at Laredo moving from its yards to the Boundary Line and thence to El Oro, Mexico, upon a through bill of lading from said yards to El Oro, notwithstanding no new payment or promise of any consideration other than the lower export rate already paid under the Sharon bill of lading for delivery at the Boundary Line. We submit that no proposition which would thus result is known to our law and should never be sustained.

Petitioner next cites in support of its contention (which if sustained would give the foregoing result) RICE v. OREGON SHORT LINE, 198 Pac. 161 (p. 16, Brief). The very quotation tendered by Petitioner from that case squarely forbids its application in support of Petitioner's contention. Issuance of a new bill of lading is there recognized, **"where all the obligations of a previous contract of shipment are terminated, and there has been a delivery to the consignee prior to the making of a subsequent contract for shipment into another state,** the carrier of the property under the subsequent contract of shipment is the initial carrier under the Carmack Amendment" (p. 16, Brief). (Black type supplied.) That is to say, before Respondent could become an initial carrier under the Carmack Amendment by issuing the instrument sued upon, the obligation of the Sharon bill

of lading to deliver at the Boundary Line under the export rate must have been completed, and that prior to issuance of said instrument the shipment must have been delivered to the consignee and the Sharon bill of lading discharged. If it was discharged while in the yards at Laredo, that would mean the destination was changed to the Laredo yards, which was short of the International Boundary Line, and that the higher domestic rate was applicable. No requisite quoted from the Rice case by Petitioner existed. Both are affirmatively established to have not existed. A through bill of lading for a shipment from the yards in Laredo to El Oro, which must be first transported to the Boundary Line, cannot be squared with a bill of lading covering the same shipment which already obligated delivery at the Boundary Line for export to El Oro. The holding by the Supreme Court of Texas that Respondent is not an initial carrier under the Carmack Amendment with respect to the instrument sued upon seems to be squarely sustained by the Rice case.

Petitioner next cites LOUISVILLE & NASHVILLE RY. v. JOHNSON, 206 S. W. 638, to sustain its contention here (p. 17, Brief). The first statement quoted by Petitioner from the opinion in the Johnson case says:

> "It does not appear that the shippers obtained any advantages in rates by virtue of the new contract."

That, alone, materially distinguishes the Johnson case from Petitioner's case. The Sharon bill of lading imposed no liability under the Carmack Amendment for Mexican negligence. The instrument here in question is made the basis of an alleged cause of action for Mexican negligence under the Carmack Amendment. Therefore, the Johnson case is not authority for Petitioner's contention, because

the new cause of action claimed would confer a very substantial advantage over anything conferred by the original contract.

Petitioner cites to sustain its contention SOUTHERN PRODUCE CO. v. NORFOLK SOUTHERN CO., 132 S. E. 360, (p. 18, Brief). No statement is tendered in the Brief with respect to the holding nor to show applicability here. The opinion in said case is rather lengthy. To read the opinion is to perceive it has no application here, for the sole issue there for decision was whether or not the initial carrier was liable under the Carmack Amendment for negligence beyond the original destinaton contracted for by the initial carrier after its bill of lading was by a connecting carrier, and without consent of the original carrier, extended to a further point than made the destination by the original bill of lading, and over a new line of road. No question of consideration was made in that case. The Court there held that the amendment did not impose liability upon the originating carrier for said negligence. Therefore, it has no application to the contention Petitioner here makes.

Without comment, Petitioner cites CHASE & CO. v. FLORIDA EASTCOAST RY., 115 So. 825 (p. 18, Brief), as in point here. As we understand that case, it, too, held that an initial carrier's liability for an interstate shipment is regulated by the through bill of lading and that the Carmack Amendment does not extend liability of the initial carrier to negligence sustained by the shipment after it has reached its original destination and is being further transported under a reconsignment without consent of the originating carrier. Want of consideration does not seem to have been raised in that case. That there was consideration is to be inferred from the fact the destination

point was extended which would suggest additional freight charges. The two foregoing cases would be in point if the Pennsylvania Company was being sued as initial carrier for Mexican negligence under its bill of lading upon the theory Respondent had extended the bill of lading destination from the Boundary Line to El Oro, Mexico, and both would be authority for denying such liability. Clearly, they do not support any contention of Petitioner here.

SECOND COUNTER-POINT
(Counter to Point II, Page 19 of Brief)

THE SUPREME COURT OF TEXAS CORRECTLY HELD UPON THE RECORD HERE THAT THE INSTRUMENT ISSUED BY RESPONDENT AND DELIVERED TO PETITIONER'S AGENT AT LAREDO, TEXAS, SEPTEMBER 29, 1934, WAS NOT A THROUGH BILL OF LADING COVERING THE SHIPMENT IN QUESTION FROM RESPONDENT'S YARDS IN LAREDO, TEXAS, TO THE INTERNATIONAL BOUNDARY LINE AND THENCE TO EL ORO, MEXICO, WITHIN THE MEANING OF U. S. C. A. TITLE 49, SEC. 20 (11).

ARGUMENT AND DISCUSSION OF AUTHORITIES UNDER SECOND COUNTER-POINT

Among other inaccuracies with respect to the facts found in Petitioner's Argument which have already been pointed out, this additional incorrect and misleading statement is made (p. 19, Brief):

> "(2) On September 29, 1934, the following day, Respondent issued its bill of lading to Fausto Trevino, and thereupon transported the shipment over its line of railroad to the International Bridge ***."

The Supreme Court of Texas clearly stated in its opinion as a stipulated fact, which is true, that:

> "After issuing this instrument, Petitioner delivered same to Trevino **who then completed his arrangements with the Mexican Customs office for transportation into Mexico. He then notified Petitioner of that fact and thereupon Petitioner moved the cars,** laden with the machinery, from its yards to the middle of the International Bridge. * * *." (R. p. 106; R. 1st, p. 42.) (Black type supplied.)

Respondent timely pleaded that the instrument was delivered for the convenience of said agent in making his arrangements to get the shipment into Mexico. Stipulations clearly sustain the inference that such was the purpose of the instrument. The clear inference to be drawn from Petitioner's statement is that upon delivery of the instrument, and without more, Respondent transported the shipment by reason of the instrument. Such inference is accomplished by wholly ignoring said pleading and stipulation, and would be incorrect. It is said (p. 19, Brief) Respondent did and said nothing until after suit to indicate its intention the instrument was not intended or did not constitute a through bill of lading to El Oro, Mexico. That is not an accurate statement.

> "* * * Defendant, on April 15, 1936, rejected the claim made by Plaintiff upon it, covering the damage sought to be recovered in this suit." (11th Stipulation, R. p. 45.)

Suit was not instituted until October 10, 1936. (R. p. 45.) There is no pleading or evidence that Petitioner ever claimed Respondent to be liable upon the instrument in issue for the Mexican negligence until said claim (which was promptly denied) was made in 1936. Petitioner did not make intention of the parties an issue by its pleading. It has relied throughout solely upon the legal effect to

be determined from the face of the instrument without respect to actual intention of the parties. Intention being material (where it would violate no law), Respondent put intention in issue by pleading there was no intention to issue a through bill of lading and no understanding on the part of either that the instrument sued upon constituted a through bill of lading or more than a receipt with which Petitioner's agent could facilitate his arrangements with Mexican authorities to export the shipment into Mexico. No law imposed upon Respondent any obligation to issue a through bill of lading from Laredo to any point in Mexico. Therefore, the pleaded intention of both parties was permissible for it violated no duty imposed by law upon Respondent.

The understanding between Respondent and the Mexican Lines that when Respondent delivered at the International Boundary Line, where its rails connect with those of the Mexican Line, shipments for export to Mexico, the Mexican Lines would there accept such shipments for further transportation in accordance with the intention when the shipment originated, was essential to the mechanics necessary to execute and discharge domestic bills of lading for export shipments. Stipulations in the Record show that Respondent has no interest in the Mexican Lines and no agreement of any sort to, and does not share in, any charges for transportaton beyond the Boundary Line. True, Respondent has made no contention with respect to what bill of lading, receipt or contract, if any, was made governing the shipment by the National Railways of Mexico. There is no pleading by either party; and no fact or evidence in the Record, with respect to anything that happened beyond the Boundary Line, except the pleading by Petitioner and the stipulation in support thereof that the negligence for which it seeks

to hold Respondent occurred on the Mexican Lines in Mexico. The Record will support this statement: There is therein nothing outside Briefs by Petitioner and the Opinion by the Court of Civil Appeals with respect to whether or not the instrument sued upon was used by the Mexican Lines as a bill of lading; or whether any other receipt or contract was issued by those Lines. A clear stipulation is made of the true facts that Respondent did not have and has no agreement with the Mexican Lines to be reimbursed for any damages Respondent may pay for negligence of those Lines, and that Respondent did not, and had no agreement to, receive any portion of any charges paid for service beyond the Boundary Line.

Petitioner recites in support of its contention the instrument sued upon was a through bill of lading from the Laredo yards to El Oro, Mexico, those cases cited under its Point I, and in addition thereto cites BARRETT v. NORTHERN PAC. RY., 157 Pac. 1016, and HOUSTON E. & W. T. RY. CO. v. HOUSTON PACKING CO., 221 S. W. 316 (p. 20-22, Brief). All cases except the last two have been discussed in this Brief.

The Houston Packing Co. case was brought against the H. E. & W. T. Ry. as initial carrier for damages to an interstate shipment. The shipment was first delivered to the International Company at Houston, Texas, and by it, for a switching charge paid to it by the H. E. & W. T., switched to the H. E. & W. T. tracks in Houston. The H. E. & W. T. issued its interstate bill of lading for the car while it was still in possession of the International Company, which handled the car, only, under switching rules of the Texas Railway Commission. The only contract involved was said bill of lading issued to the Packing Co. by the H. E. & W. T. The sole question presented

and decided was whether the H. E. & W. T. or the International Company was initial carrier within the meaning of the Carmack Amendment. The Texas Court held the H. E. & W. T. was the initial carrier and that within said amendment, "initial carrier" means the carrier who first contracts to transport the shipment from one state to another, and said:

> "The underlying principle of the Carmack Amendment is one of agency, the connecting carriers being made the agents of the initial one for the purpose of taking the goods from the point of shipment to destination, pursuant to terms of the initial carrier's contract." (p. 317, 221 S. W.)

No issue of consideration nor of the issuance of a new bill of lading, without new consideration, extending the original destination before delivery there, was involved in the Houston Packing Co. case. The Court held in the Houston case, and we think correctly so, that the liability imposed by the Carmack Amendment is grounded upon the agency of the connecting carriers for the first carrier issuing the bill of lading. Agency depends upon contractual relations. No one has legal power to constitute another his principal against the other's will; nor may one constitute another his agent against the other's will. Therefore, there being no pleading nor evidence here of any authority for Respondent to bind the Mexican Lines, and the pleading and stipulations both affirmatively establishing that Respondent has no interest therein and no agreement of any sort to profit from charges paid for transportation into Mexico, upon what theory may the contention of Petitioner be upheld, which must be essentially grounded upon the agency of the Mexican Lines for Respondent in the handling of this shipment?

It is submitted the Houston case is authority against rather than for Petitioner's contention.

The quotation by Petitioner from BARRETT v. NORTHERN PACIFIC CO., 157 Pac. 1016, (p. 21-22, Brief), is, itself, sufficient to show it does not sustain Petitioner's contention. The shipment there was interstate and not foreign. The Court noted that the initial carrier liability was imposed by the Carmack Amendment with respect to interstate shipments **without issuance of a bill of lading.** Here, said statute makes a "through bill of lading" essential to the initial carrier liability. There, the question of no new consideration was not presented. The destination of an interstate shipment having been extended, it may be safely assumed that additional charges providing new consideration were assessed. The Court stated the question for decision to be: "Did appellant receive the goods for such (interstate) a shipment?" (p. 22, Brief.) The carrier sued was requested by the shipper before the original destination was reached to continue transportation beyond that destination upon arrival thereat and to a distant point. The carrier undertook to do so. It evidenced its undertaking by, itself, altering the original bill of lading by striking out its destination, "Spokane," and inserting, "Rupert, Ida." Upon those facts and in that situation the Court held said carrier was an initial carrier within the Carmack Amendment, and that issuance of a bill of lading was not essential to the liability. Not so here under the plain provisions of the statute.

It is, therefore, submitted no authority cited sustains any contention urged by Petitioner and that upon this record the Supreme Court of Texas correctly held the instrument sued upon was not a through bill of lading from Laredo to El Oro within the meaning of the Carmack-Cummins Amendments.

Petitioner says the Supreme Court of Texas did not hold the instrument sued on to be invalid as violative of any subsection of Section 6, 49 U. S. C. A., although the Court of Civil Appeals did so hold, and Petitioner anticipates, "that Respondent will again argue that the contract is violative of one or another of the subsections of such statute" (p. 23, Brief). Petitioner did plead and argue in the State Courts that said Section 6 forbade Respondent power to engage upon transportation from Laredo to points in Mexico because it had not made or posted any rates to govern the transportation, no tariff existed which did so, and being denied power to engage upon the transportation here claimed to have been engaged upon under the instrument sued upon, it was, as such a contract, distinguished from all cases where the power to engage upon the transportation existed by reason of compliance with said Statute and courts have held that contracts with respect to transportation authorized by the Statute but in violation of regulations governing transportation are not void.

The Supreme Court of Texas did not decide said question. It decided, only, that the instrument sued upon

was supported by no consideration; that under the facts of this Record it was void as a new bill of lading covering the transportation from the Laredo yards to the Boundary Line; and would not support initial carrier liability against Respondent for Mexican negligence as a bill of lading, only, from the Boundary Line to El Oro. We understand those to be the only issues properly before this Court. Therefore, reply to Petitioner's Point III, which presents a question not decided by the Supreme Court of Texas nor properly before the Court, is not made.

CONCLUSION

Clarification from the Record of many terse statements made by Petitioner and believed by Respondent to be incorrect in some instances, and in others insufficient to a full understanding of the Record as a whole; and the effort to take hold of and analyze each authority cited by Petitioner and discuss its applicability or not under the facts of this Record to support the contention with respect thereto made by Petitioner, have necessarily exacted a longer reply than the Petition and Brief in support thereof and than Respondent would prefer. However, it is submitted the result has been to show that the Supreme Court of Texas committed no error and made a proper decision of the questions attacked by the petition.

PRAYER

Wherefore, Respondent respectfully submits the foregoing Brief with the Prayer the judgment by the Supreme Court of Texas be affirmed, for general relief and its costs.

Respectfully submitted,

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